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IN THE

Supreme Court of the United States

No. 76-1701

TENNESSEE VALLEY AUTHORITY, *Petitioner,*

v.

HIRAM G. HILL, JR., ZYGMUNT J. B. PLATER, DONALD S. COHEN, THE AUDUBON COUNCIL OF TENNESSEE, INC., THE ASSOCIATION OF SOUTHEASTERN BIOLOGISTS, *Respondents.*

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER TENNESSEE VALLEY AUTHORITY

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MOTION OF PACIFIC LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 42, Pacific Legal Foundation hereby respectfully moves the Court for leave to file its brief *amicus curiae* bound with this motion.

The accompanying brief urges this Court to reverse the decision of the Court of Appeals in *Hill* v. *Tennessee Valley Authority,* 549 F.2d 1064 (6th Cir. 1977) and to reinstate the decision of the District Court in *Hill* v. *Tennessee Valley Authority,* 419 F. Supp. 753 (E.D. Tenn. 1976).

The Pacific Legal Foundation is a non-profit, tax exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public inter-

est. The Foundation has more than 20,000 contributors, and supporters throughout the United States. Policy for the Foundation is set by a Board of Trustees composed of concerned citizens. After evaluating the decision of the Court of Appeals, the Board has determined that a substantial question affecting the public interest is involved and has approved the filing of a brief *amicus curiae* in this matter.

The Pacific Legal Foundation strongly supports the development of sound policies for implementing the Endangered Species Act. The Foundation believes that the balancing of the equities approach applied by the District Court serves the public in the manner intended by Congress.

The Foundation believes that the Endangered Species Act must be enforced in a manner which considers not only biological factors but also social and economic concerns. The Foundation has devoted a substantial portion of its resources to assuring that such a policy is effectuated. In furtherance of this policy, the Foundation has brought suit in *Pacific Legal Foundation* v. *Cecil Andrus,* No. 77-1054 (E.D. Tenn., filed Nov. 15, 1977). Moreover, the Foundation has worked with numerous citizens' groups concerned about the Endangered Species Act.

The accompanying brief details the foregoing considerations and urges this Court to reverse the decision of the Court of Appeals. In that regard, Pacific Legal Foundation brings to this case a perspective not presently represented. Petitioner represents the important but restrictive perspective of a governmental entity charged with completing the Tellico

Dam. Respondents bring the perspective of citizens opposed to a particular federal project. Pacific Legal Foundation represents a broader and different public interest which is concerned that the Endangered Species Act be implemented nationally in the manner contemplated by Congress. Participation by Pacific Legal Foundation in this case will assist in obtaining fuller consideration of the public interest issues.

Accordingly, Pacific Legal Foundation respectfully requests leave to file the annexed brief *amicus curiae.*

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER TENNESSEE VALLEY AUTHORITY

INTEREST OF AMICUS

Pacific Legal Foundation is a non-profit, tax exempt corporation engaging in litigation in matters affecting the public interest. The Foundation has as a principal concern the development of environmental law within the framework of a healthy and growing national economy. The background and interest of the *amicus* is detailed in the preceding motion for leave to file this brief.

INTRODUCTION

There are those who would portray the Tennessee Valley Authority (TVA) as an uncaring giant pitting

its might against a helpless three inch fish. The District Court found otherwise:

> TVA has made a good faith effort to conserve the snail darter and has consulted with other agencies about the problem rather than taking the immutable position that it was not required to comply with the Act. *Hill* v. *Tennessee Valley Authority*, 419 F. Supp. 753, 763 (E.D. Tenn. 1976).

While the Court of Appeals agreed with the District Court on this point,[1] it interprets the Endangered Species Act in a mechanical and inflexible manner. As a result, it is TVA that is helpless and reduced to impotence while a three inch fish is permitted to control the destiny and resources of millions of people. In short, the Act that was intended as a shield has become a sword in the hands of those who, for whatever reason, oppose projects developed pursuant to proper exercise of administrative or legislative authority.

BACKGROUND

The Tellico Dam, which was begun in March of 1967, is essentially completed and ready for operation.[2] This project was built in full compliance with the applicable environmental statutes and has withstood the tests of unrelenting environmental challenge. *Environmental Defense Fund* v. *Tennessee Valley Authority*, 339 F. Supp. 806 (E.D. Tenn. 1972) *aff'd*, 468 F.2d 1164 (6th Cir. 1972); *Environmental Defense Fund* v. *Tennessee Valley Authority*, 371 F. Supp. 1004 (E.D. Tenn. 1973) *aff'd*, 492 F.2d 466 (6th Cir. 1974).

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[1] Hill v. Tennessee Valley Authority, 549 F.2d 1064, 1974 (6th Cir. 1977).

[2] Hill v. Tennessee Valley Authority, 419 F. Supp. at 759.

In 1973 the snail darter was discovered in an area to be impounded by a reservoir. Shortly after the species was discovered the Endangered Species Act was enacted. 16 U.S.C. § 1531, *et seq.* (Supp. V 1974). Respondents in this case petitioned the Secretary of the Interior to place the snail darter upon the Endangered Species List. By April of 1976 the darter was on the list and the area at the base of the Tellico Dam was designated "critical habitat."

In February of 1976 respondents filed the instant action which is the third attempt to block the construction of this project. The District Court found that the Tellico Dam Project was essentially completed and that no alternatives were available "short of scrapping the entire project." *Hill*, 419 F. Supp. at 758. Scrapping the Tellico Project will have an enormous impact upon the region which is characterized by unemployment, low income, and youth migration. The District Court further found that the public treasury would suffer an immediate loss of 53 million dollars in nonrecoverable obligations. *Id.* at 760. In spite of these findings the Court of Appeals reversed the District Court and enjoined construction of the dam.

ARGUMENT

I.

Congress, With Full Knowledge Of The Impact On The Snail Darter, Declared Its Intent That The Tellico Dam Project Be Completed

Prior to the placing of the snail darter on the Endangered Species List, TVA informed both House and Senate Committees of the existence, status, and habitat of the snail darter and of efforts of TVA to preserve

the darter. In recommending for appropriations the House Committee stated:

> The Committee directs that the project, for which an environmental impact statement has been completed and provided the Committee, should be completed as promptly as possible for energy supply and flood protection in the public interest. [*H.R. Rep. No.* 319, 94th Cong., 1st Sess. 76 (1975)].

With full knowledge of the snail darter Congress appropriated over 29 million dollars and the President signed the appropriations into law.

Approximately a year later, *after* the snail darter was classified as an endangered species, officials of TVA fully explained to Congress all the options now before Congress and the public. In unmistakable language the Senate Committee stated:

> The Committee does not view the Endangered Species Act as prohibiting the completion of the Tellico project at its advanced stage and directs that this project be completed as promptly as possible in the public interest. [*S. Rep. No.* 960, 94th Cong. 2d Sess. 96 (1976)].

Congress *once again* appropriated monies for the Tellico project. The bill was signed by the President.

Congress can, through appropriation acts, suspend the operation of another statute. "The whole question depends on the intention of Congress as expressed." *United States* v. *Mitchell,* 109 U.S. 148, 153 (1893). Congres can express its intent through simple failure to appropriate monies or expressly, as in *Mitchell.* There is, however, "no doubt that Congress could suspend or repeal" the authorization of a statute by an amendment to an appropriations bill. *United States* v. *Dickerson,* 310 U.S. 554, 555 (1940).

It is clear Congress thought the Endangered Species Act did not bar completion of the Tellico Dam. The plain language of Committee reports[3] and congressionally approved appropriations indicate an unambiguous congressional intent to complete the Tellico Project.

II.

The Endangered Species Act Does Not Strip The Court Of Its Inherent Equitable Power To Determine Whether Or Not It Is In The Public Interest To Grant Equitable Relief

Section 11 of the Endangered Species Act, 16 U.S.C. § 1540(c), grants the district courts jurisdiction over any actions arising under the Act. The enforcement powers granted these courts are permissive:

> The judges of the district courts of the United States and the United States magistrates *may,* within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process as may be required for enforcement of this chapter and any regulation issued thereunder . . . 16 U.S.C. § 1540(e)(2).

This is to be compared with other sections of the Act in which enforcement powers are mandatory.[4] While the grant of jurisdiction and power to the district court includes the *power* to grant injunctions, there is no change in the *standards* for granting injunctions,

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[3] 1973 *U.S. Code Cong. and Adm. News,* 2989, 2991. These reports show that the Secretary of Interior is provided with discretion to list and de-list animals and to create efficient management programs.

[4] E.g. Mandatory Forfeiture, 16 U.S.C. § 1540(4).

and no elimination of the power of the court to withhold injunctive relief after a balancing of equities. Of course, the application of this balancing approach requires that the party sought to be enjoined comes with clean hands to request a balancing of the equities. *See United States* v. *San Francisco,* 310 U.S. 16, 30 (1940).

Generally, injunctive relief is to be sparingly granted. This Court has stated:

> There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury.... *Truly* v. *Wanzer,* 46 U.S. 141, 142 (1847).

The mere grant of jurisdiction under the Endangered Species Act did not require the District Court to enjoin the Tellico Project. This Court rejected such a mechanical approach in *Hecht* v. *Bowles,* 321 U.S. 321 (1944).

In *Hecht,* the government urged that once it was established that the defendant engaged in acts violative of the Emergency Price Control Act of 1942, injunctive relief was available as of right. 321 U.S. at 322. Here the Court stated:

> But we do not think that under all circumstances the Court must issue the injunction or other order which the administrator seeks.
>
> . . . .
>
> A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. 321 U.S. at 328, 329.

In analyzing the equity jurisdiction of a district court confronted with a statute specifically providing injunctive relief, this Court noted that the "historic injunctive process was designed to deter, not to punish." 321 U.S. at 329.

Flexibility, rather than rigidity, has distinguished injunctive relief. Mercy, practicability, adjustment, public interest, good faith, and difficulties of compliance are unique considerations of injunctive relief. In a later decision this Court reaffirmed the balancing of equities approach and took special note of public interest cases:

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And *since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character* than when only a private controversy is at stake. *Porter* v. *Warner Co.,* 328 U.S. 395, 398 (1946). [Emphasis added].

More recently, in cases involving the retroactive application of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4221 *et seq.,* courts have followed the same balancing of the equities approach. *See Conservation Society of Southern Vermont, Inc.* v. *Train,* 508 F.2d 927 (2nd Cir. 1974), *vacated on other grounds,* 423 U.S. 809 (1975); *Greene County Planning Bd.* v. *FPC,* 455 F.2d 412-25 (2nd Cir.) *cert denied,* 409 U.S. 842 (1972).

In stark contrast to the traditional equities approach applied by the District Court, the Court of Appeals, in the instant case, found that once a violation of the Act existed, an injunction must be issued. The Court of

Appeals simply stated that the "District Court abused its discretion when it refused to enjoin a clear violation of federal law." 549 F.2d at 1074.

Consideration of the equities in this case shows the harsh results inherent in the Court of Appeals' approach.

III.

The District Court Properly Balanced The Equities In Refusing To Enjoin Completion And Operation Of The Tellico Project

In denying respondents' request for injunctive relief, the District Court properly considered the public benefits associated with the Tellico project. Construction of the Tellico Dam project, initiated in 1967, is essentially complete. Over 105 million dollars have been spent of the approximately 116 million specifically allocated for the project. The District Court found that there will be a 53 million dollar unreimbursed loss if the project is enjoined. If the respondents succeed, the project will stand completed but unused. The District Court found that there is no alternative other than abandoning this completed project.

In addition to this initial economic loss, energy production, flood control, employment opportunities and recreation benefits will also be lost. If the project is enjoined, as respondents desire,[5] the public as a whole

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[5] *Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1976 before a Subcommittee of the House Committee on Appropriations*, 94th Cong. 1st Sess. Pt. 4, 3776 (1975); *See also Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1977 before a Subcommittee of the House Committee on Appropriations*, 94th Cong., 2d Sess. Pt. 4, p. 3096-3099; and Pt. 5, p. 260-262 (1977).

will be irreparably harmed through loss of these additional benefits which would have enhanced the quality of life.

The District Court, in refusing to enjoin completion of the Tellico Dam, applied the traditional principal of equity that an injunction, as an extraordinary remedy, "should be sparingly exercised" in cases clearly warranting such relief. *Dorfman* v. *Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969). In determining whether the applicants had met their burden, the District Court analyzed the facts, carefully weighed the requirements of injunctive relief, and construed the Endangered Species Act in a manner consistent with its legislative purpose and history. After looking at these equitable factors this court stated:

> At some point in time a federal project becomes so near completion and so incapable of modification that a court of equity should not apply a statute enacted long after inception of the project to produce an unreasonable result. 419 F. Supp. at 760.

In considering the likelihood of injury to respondents the District Court found TVA had taken every possible step short of abandoning the completed project to preserve the snail darter. It was TVA that transplanted the darter and spent monies on research, even prior to the listing of the darter. In terms of injury to the fish, it was and is TVA that acted to minimize harm. The injury to the respondent is speculative, at best, and only the result of excessively rigid statutory construction. The Court of Appeals improperly construed the language of the Endangered Species Act and thereby eliminated the district court's traditional powers of equitable discretion.

The Endangered Species Act could not have been conceived as a program to freeze the number of species on earth; that number probably exceeds two million with new species being constantly identified.[6] The number of species which have passed out of existence in the earth's history is staggering. Congress did not legislate a biological impossibility, and to so interpret the Endangered Species Act creates an unworkable statute under which opponents of any particular human endeavor can seek out obscure and heretofore unknown species of insect, fish, mollusk, and plant for the purpose of ceaseless legal challenges.

Nevertheless, the Court of Appeals adopted an inflexible construction of the Act which ignores the benefits and equities, despite legislative history to the contrary, stating: "The meaning and spirit of the Act are clear on its face. We need not refer to legislative history to rationalize our independent assessment of its impact." 549 F.2d at 1072. In discussing the District Court's example of the worst case possible in which a 100% completed project is found to impact on an endangered species the day before it is to become operational, the Court of Appeals stated: "Conscientious enforcement of the Act requires that it be taken to its logical extreme." 549 F.2d at 1071. This plain meaning doctrine relied upon by the Court of Appeals is inappropriate. For, where the "plain meaning" has "led to absurd or futile results . . . this Court has looked beyond the words to the purpose of this Act." *United States* v. *American Trucking Assns.*, 310 U.S. 534, 541

[6] K. M. Schreiner, *A Word About the Technical Bulletin; Endangered Species Tech. Bl.*, Vol. I, No. 1, USDI, U.S. Fish and Wildlife Service (July, 1976).

(1940); *see also Train* v. *Colorado Pub. Int. Research Group*, 426 U.S. 1 (1976).

As noted previously, the courts below recognized the good faith efforts by TVA to save the snail darter. Further, there has been no finding of a violation of the prohibited acts delineated in Section 9 of the Act, 16 U.S.C. § 1538. Instead, the Court of Appeals found a violation of Section 7, 16 U.S.C. § 1536, despite the fact that this section only creates a process for "interagency cooperation" and for "consultation." The Act and its history evidence concern to prevent extinction of species within the context of creating effective management programs. It was not designed as a means to preclude action by other agencies in fulfillment of their legislative responsibilities.

In ignoring the unique factual circumstances presented in this case, the Court of Appeals produced the extreme and harsh result of enjoining a highly beneficial project which is essentially complete. Congress, in enacting the Endangered Species Act, did not intend that the law be construed in such a restrictive manner.

CONCLUSION

For the reasons stated above, Pacific Legal Foundation urges the Court to reverse the Court of Appeals and to reinstate the opinion of the District Court which accurately expresses the public policy as expressed by Congress.

Respectfully submitted,

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